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# LEGAL ISSUES



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## Legally Speaking — Virtual Copyright: The Applicability and Ownership of Copyright in Second Life

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In the mid-1990s, once it became clear that the Internet had taken off and was going to be accepted by the public, publishers and librarians began asking questions about how this new medium was going to affect copyright. Scholars began writing speculative articles, applying “real world” copyright principles to the virtual world of the Internet. (Many old-timers believe that this is when the Internet was ruined.) This was followed in turn by legal cases testing the boundaries of the law in the face of this new medium. Many of these cases have been discussed in previous issues of *Against the Grain*.

The news today is similar to that in 1993-1996. There is a hot new online medium which is connecting people around the world. It connects jobseekers with employers, provides a means of finding love connections, and brings people together who have similar interests. Virtual conferences are now possible, and it has the potential to revolutionize education by connecting student and teacher in new ways. This new medium includes text-based content such as writing, pictorial representations, and multimedia materials (both music and video). Sounds like the hype about the World Wide Web, doesn't it? (And, of course, we all know that it didn't quite work out that way; however, the Web is still an invaluable part of today's world.) However, the medium I am talking about today is the virtual online world known as *Second Life*.

Unlike the Internet, which was “owned” by the public through governments, universities, and ICANN,<sup>2</sup> *Second Life* was created by **Linden Lab**, a privately-held company based in San Francisco.<sup>3</sup> This distinction means that there are many different questions that need to be asked about intellectual property in *Second Life*. At the same time, however, many questions are familiar from the Internet world of the last decade.

### A Universe of Virtual Worlds

*Second Life* is not the only virtual world. The **Wikipedia** article on Virtual World<sup>4</sup> lists

many different types. Other virtual worlds include *Cityspace*, *Dreamscape*, and *SimCity*. *Second Life* is an example of what is called a “Massively Multiplayer Online Social Game” (MMOSG). Unlike traditional computer games, MMSOGs “focus on socialization instead of objective-based gameplay.”<sup>5</sup> Other MMSOGs include Habbo Hotel, Entropia Universe, Furcadia, There, and Dotsoul.<sup>6</sup> However, *Second Life* has proved to be the most popular and widely-used MMSOG, and indeed the most popular virtual world.

Within *Second Life*, I can create a virtual representation of myself, called an “avatar.” My avatar can buy clothes, hear a concert, purchase property, and create new worlds. All it takes is time, money (Linden dollars actually trade for US\$), and the ability to manipulate sims and prims, which are the basic building blocks of everything in *Second Life*.

In *Second Life*, regions (called “islands”) are made out of “sims.” Objects, on the other hand, are built out of geometric shapes called “prims.” “Prims can assume any shape you want, and they come in a variety of shapes to make transformations easier. And you can make prims look any way you want by applying selected textures to their surfaces. . . . They can be given certain qualities and features [such as transparency or the ability to flex/bend with the wind], they can be linked together, and they can be made to do things in a script written in LSL — *Second Life*'s scripting language. For example, in *Second Life* a dog moves and barks as an animated object made of linked prims, scripted to move in a certain way and play custom sound effects.”<sup>7</sup>

When you create an object, it has its own economic and social value. For example, many people create clothing, furniture, works of art, etc. in *Second Life*, which they then sell to other inhabitants of the virtual world.

I am using *Second Life* as an example of virtual worlds. The copyright principles in this article apply equally to all virtual worlds, although the *Second Life* terms of service are unique. However, *Second Life* provides a good

example of the way in which the *Copyright Act* works with virtual worlds.

### Eligibility for Copyright Protection

Which intellectual property laws apply to the items created in *Second Life*? Copyright definitely applies, and patent law may apply to some creations (particularly business methods). Trademark law is more problematic, but I believe a good argument could be made. This article will cover applicability of copyright law and ownership issues only. I will discuss other copyright issues such as fair use in future columns.

Let's start with the status of virtual representations. There are actually two ways in which to approach the concept of copyright in *Second Life*. First, you can look at the creations as if they are stand-alone pieces of property. Second, you can look at the computer code behind these creations. The two methods lead to similar conclusions in eligibility for copyright protection, but then diverge on the question of ownership. Section 102 of the *Copyright Act* states that:

“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.”<sup>8</sup>

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Before an item can be subject to Federal copyright, it must be fixed. (Some unfixed items such as lecture notes may still be subject to state common law copyright.)<sup>9</sup> The act states that "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."<sup>10</sup> If you treat the items created in the virtual world as if they were creations in the real world, they qualify as being fixed. For example, I can create an avatar, a house, or a piece of furniture in *Second Life*. At that point, my avatar is stable and more than transitory. I can perceive my creation each time I log onto *Second Life*, and so can all the other people who are logged on. All that is needed is the proper software. I can reproduce the furniture I created and sell it. I am doing so with the aid of a machine, but that is allowed under copyright law. Therefore *Second Life* passes the test of being a fixed work in a tangible medium by using the virtual object view.

Analyzing these actions using the computer code view leads to the same conclusions. When I manipulate sims and prims on *Second Life* to build a virtual representation of my library, what I have really done is to manipulate code on a computer. I may purchase an island for myself in *Second Life*, but in the first life I have merely bought server space. However, computer code is still eligible for copyright protection. According to the **Copyright Act**, "A 'computer program' is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."<sup>11</sup> This is certainly what is happening on the server at **Linden Lab**. Therefore, my creations qualify for copyright protection using the computer code view.

### Ownership of Copyright in *Second Life*

Since the creations on *Second Life* are fixed in a tangible medium of representation, the next question is who owns them. Generally the person who creates an item owns the copyright, unless the work for hire doctrine applies or unless there are restrictions in licensing agreements. Under the virtual world view of *Second Life*, my avatar is my creation, so I own it. I created it by putting together the sims and prims in my own unique way.

On the other hand, the computer code view leads to a different conclusion. **Linden Lab** owns the code to the program, and anything that I do with that code constitutes a derivative work. The classic example of derivative work is *Gone with the Wind*. When the novel was made into a movie, what happened to the copyright?

According to the statute, "A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications that, as a whole, represent an original work of authorship, is a 'derivative work.'"<sup>12</sup> Section 103 of the **Copyright Act** goes on to explain:

"The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material."<sup>13</sup>

In other words, the copyright for the movie *Gone with the Wind* is separate from the copyright for the book. The rights to the movie have nothing whatever to do with the rights to the book. **Margaret Mitchell** still owned the rights to the novel. She licensed these rights to the movie producers, but did not give them up. At the same time, however, she didn't acquire any rights to the movie version other than what she already had from the novel.

Returning now to *Second Life*, I can manipulate the code in my own way to create a different computer program, but the underlying code is still owned by **Linden Lab**. Thus, my avatar is a derivative

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work. I can create an avatar for use in *Second Life*, but under copyright law I can't download it without permission to use with my library's virtual reference chat service. Doing so would be a violation of **Linden Lab**'s copyright ownership over the computer code upon which my derivative work is based.

Several sections in the terms of service in *Second Life* reflect the computer code view of virtual worlds. One provision recognizes **Linden**'s ownership of the code, while another section discusses the rights of others. Ultimately, however, **Linden Lab** has decided to limit its rights to the virtual world itself rather than the derivative items created by its users. Section 3.1 and 3.3 of the terms of service recognize the derivative nature of the computer code:

"3.1 You have a nonexclusive, limited, revocable license to use *Second Life* while you are in compliance with the terms of service. . . . Subject to the terms of this Agreement, **Linden Lab** grants to you a non-exclusive, limited, fully revocable license to use the **Linden Software** and the rest of the Service during the time you are in full compliance with the Terms of Service. . . . Nothing in this Agreement, or on **Linden Lab**'s Websites, shall be construed as granting you any other rights or privileges of any kind with respect to the Service or to any Content. You acknowledge that your participation in the Service, including your creation or uploading of Content in the Service, does not make you a **Linden Lab** employee and that you do not expect to be, and will not be, compensated by **Linden Lab** for such activities. . . ."<sup>14</sup>

"3.3 **Linden Lab** retains ownership of the account and related data, regardless of intellectual property rights you may have in content you create or otherwise own.

"You agree that even though you may retain certain copyright or other intellectual property rights with respect to Content you create while using the Service, you do not own the account you use to access the Service, nor do you own any data **Linden Lab** stores on **Linden Lab** servers (including without limitation any data representing or embodying any or all of your Content). Your intellectual property rights do not confer any rights of access to the Service or any rights to data stored by or on behalf of **Linden Lab**."<sup>15</sup>

These two sections represent a recognition that **Linden Lab** owns the computer code. I can use *Second Life* as it was intended to be used simply by agreeing to the terms of service. That includes the creation of derivative works such as an avatar, but **Linden Lab** still owns the avatar code.

Not everything in *Second Life* comes from

the manipulation of sims and prims. I can use my avatar to sing in a nightclub. Suppose that I wrote a song which I performed in *Second Life*. At that point, I have intellectual property rights in my song, but I'm still using **Linden**'s code to "perform" it. The terms of service recognize this issue and provide for it in section 1.3 by stating:

"Content available in the Service may be provided by users of the Service, rather than by **Linden Lab**. **Linden Lab** and other parties have rights in their respective content, which you agree to respect.

"You acknowledge that: (i) by using the Service you may have access to graphics, sound effects, music, video, audio, computer programs, animation, text and other creative output (collectively, "Content"), and (ii) Content may be provided under license by independent content providers, including contributions from other users of the Service (all such independent content providers, "Content Providers"). **Linden Lab** does not pre-screen Content.

"You acknowledge that **Linden Lab** and other Content Providers have rights in their respective Content under copyright and other applicable laws and treaty provisions, and that except as described in this Agreement, such rights are not licensed or otherwise transferred by mere use of the Service. You accept full responsibility and liability for your use of any Content in violation of any such rights. You agree that your creation of Content is not in any way based upon any expectation of compensation from **Linden Lab**."<sup>16</sup>

This provision simultaneously takes care of the derivative work issue for content authored by *Second Life* users, while also dealing with the issue of material created by non-users. If I perform a work by the **Rolling Stones** in the real world, I have to pay them. Similarly, if I perform a work in *Second Life*, I also have to pay for the rights. I own the copyright for the performance, but the **Rolling Stones** still own the copyright for their songs. Meanwhile, **Linden Lab** owns the code that allowed the performance, but it doesn't own the performance itself.

Ultimately, however, **Linden Lab** has decided not to pursue its rights in derivative works. Section 3.2 of the terms of service states:

"You retain copyright and other intellectual property rights with respect to Content you create in *Second Life*, to the extent that you have such rights under applicable law. However, you must make certain representations and warranties, and provide certain license rights, forbearances and indemnification, to **Linden Lab** and to other users of *Second Life*."<sup>17</sup>

Under the terms of section 3.2, **Linden Lab** recognizes that the computer code view gives it rights over derivative works. However,

they have chosen not to exercise those rights with regard to items created within the virtual environment. It is this provision of the license agreement, rather than copyright law, that allows me to use my avatar elsewhere.

### The "Safe Harbor" Provisions of the Digital Millennium Copyright Act

The safe harbor provision of the *Digital Millennium Copyright Act (DMCA)*<sup>18</sup> protects those who provide online network services from being liable for the copyright sins of its users. If I perform a **Rolling Stones** song online without obtaining the rights, *Second Life* will be protected from being sued, despite having transmitted the infringing performance. In order to qualify for this protection, the service provider must adhere to the following requirements:

(1) The service provider did not instigate the transmission; it came from someone else.

(2) The transmission was carried out through an automated process and the service provider had no input into the selection of material.

(3) "[T]he service provider does not select the recipients of the material except as an automatic response to the request of another person."

(4) No copy is made or kept by the service provider, other than normal caching. Any cached copies must be deleted as soon as possible.

(5) "The material is transmitted through the system or network without modification of its content."<sup>19</sup>

In addition to these requirements, the service provider must take down or delete infringing materials as soon as they are notified. **Linden Lab** acknowledges the *DMCA* safe harbor provisions in section 1.2 of the terms of service:

"**Linden Lab** is a service provider, which means, among other things, that **Linden Lab** does not control various aspects of the Service.

"You acknowledge that **Linden Lab** is a service provider that may allow people to interact online regarding topics and content chosen by users of the service, and that users can alter the service environment on a real-time basis. **Linden Lab** generally does not regulate the content of communications between users or users' interactions with the Service. As a result, **Linden Lab** has very limited control, if any, over the quality, safety, morality, legality, truthfulness or accuracy of various aspects of the Service."<sup>20</sup>

In late 2006, a program called *copybot* began duplicating items created in *Second Life*. Clearly this is a violation of the rights of the IP creators in the virtual environment. **Linden** responded by deleting the accounts of those who infringe, using both the *DMCA* and the *Second Life* terms of service.<sup>21</sup> Yet **Linden Lab** also decided not to use digital rights management (DRM) technology to protect users' intellectual

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property, or to set itself up as the “copyright police.” Instead, it recommended that they use “real world” remedies, including lawsuits for infringement under the *Copyright Act*. I believe that this response was a recognition on the part of the company that “real world” copyright laws apply to the virtual environment of *Second Life*.

### Conclusion

*Second Life* provides a good example of the way in which real world copyright laws apply to virtual worlds. Intellectual output is fixed in a tangible medium of output, qualifying it for Federal copyright protection. Because the items created in *Second Life* are based on **Linden Lab**'s computer code, they are derivative works. However, **Linden Lab** has used the terms of service to grant its users the right to use any item created in *Second Life* without worrying about the underlying rights of the original computer code. Therefore, *Second Life* not only shows us how copyright law applies to the virtual universe, it also shows us how private contracts can change the default rules. No matter what copyright law says, anything is possible if the parties agree in a valid contract. And that is a lesson that we need to remember, not only in *Second Life*, but in this first life as well. 🐭

### Endnotes

1. I am one of the few residents of *Second Life* whose name is the same as it is in my first life. My *Second Life* name is Bryan Carson. However, I am not often in-world due to obligations in my first life.
2. **ICANN** is an acronym for “Internet Corporation for Assigned Names and Numbers.” **ICANN** is the entity that is responsible for global coordination of domain names, IP addresses, and other unique identifiers. Their Website is located at <http://www.icann.org>.
3. **Linden Lab**. (2007). What is **Linden Lab**? Retrieved October 4, 2007, from <http://lindenlab.com/press/factsheets/lindenoverview>.
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5. “Massively multiplayer online games.” (2007). *Wikipedia: The free encyclopedia*. Retrieved October 4, 2007, from [http://en.wikipedia.org/wiki/Virtual\\_world](http://en.wikipedia.org/wiki/Virtual_world).
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7. **Rymaszewski, M., Au, W. J., Wallace, M., et al.** (2007). *Second Life: The official guide*. Indianapolis: John Wiley: 10.
8. 17 U.S.C. § 102(a).
9. For more information, see my *Legally Speaking* column *Fair Use and the Common Law of Copyrights*, 14-1 *Against the Grain* pp. 60-63 (February 2002).
10. 17 U.S.C. § 101.
11. 17 U.S.C. § 101.
12. 17 U.S.C. § 101(3).
13. 17 U.S.C. § 103.
14. **Linden Lab**. (2007). *Second Life Terms of Service* § 3.1. Retrieved October 4, 2007, from <http://secondlife.com/corporate/tos.php>.
15. *Second Life Terms of Service* § 3.3.
16. *Second Life Terms of Service* § 1.3.
17. *Second Life Terms of Service* § 3.2.
18. 17 U.S.C. § 512(a).
19. 17 U.S.C. § 512(a).
20. *Second Life Terms of Service* § 1.2.
21. **Granick, J.** (2006, November 20). Circuit Court: *Second Life* will save copyright. *Wired.com*. Retrieved October 4, 2007, from <http://www.wired.com/gaming/virtualworlds/commentary/circuit-court/2006/11/72143>.